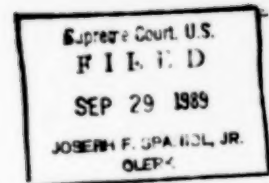


RESPONSE REQUESTED



No. 88-7384

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

JOE SOROLA,
Petitioner,
v.
THE STATE OF TEXAS,
Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

JIM MATTOX
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MARY F. KELLER
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12/12

QUESTION PRESENTED

Whether it is unconstitutional for the state to seek the death penalty upon retrial of a defendant for capital murder when the first trial resulted in the court imposing a life sentence, which it was unauthorized to do as a matter of state law.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:
NOW COMES the State of Texas, Respondent herein,¹ by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals affirming the Fourth Court of Appeals of Texas is attached to the petition as Appendix D. **Sorola v. State**, __ S.W.2d __, No. 1112-87 (Tex. Crim. App. March 1, 1989). The opinion of the Fourth Court of Appeals affirming the state trial court's denial of habeas relief is attached to the petition as Appendix C. **Sorola v.**

¹For purposes of clarity, Petitioner will be referred to herein as "Sorola" and Respondent as "the state."

State, 737 S.W.2d 118 (Tex.App.--San Antonio 1987). The trial court's findings of fact and conclusions of law and order denying habeas relief are attached to the petition as Appendix A. Ex parte Sorola, No. 10144, A-86-02-0060-CI.

JURISDICTION

Sorola seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sorola relies on the fifth and fourteenth amendments to the Constitution. Also involved herein are Section 19.03 of the Texas Penal Code and Articles 35.25, 36.11 and 37.071 of the Texas Code of Criminal Procedure.

STATEMENT OF THE CASE

The state is in substantial agreement with Sorola's statement of the case.

SUMMARY OF ARGUMENT

Sorola has advanced no important or special reason for this Court to invoke its certiorari jurisdiction to review his case.

The court below correctly applied controlling precedent of its own and of this Court in rejecting Sorola's double jeopardy claim. Sorola concedes, as he must, that the trial court acted outside the scope of its authority in discharging the jury and assessing punishment at imprisonment for life. Thus, the trial court's assessment of punishment was a nullity and poses no double jeopardy bar to a capital sentence upon retrial. Particularly is this so in light of the absence of any factual findings in favor of Sorola at the punishment phase of trial.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of sound discretion, and will be granted only when there are special

or important reasons therefor. Sorola has advanced no special or important reason in this case, and none exists. Further, the issue in this case involves only the application of established constitutional principles to the facts. Thus, the petition presents no important questions of law to justify this Court's exercise of its certiorari jurisdiction.

II.

IMPOSITION OF A SENTENCE OF DEATH UPON RETRIAL OF SOROLA FOR CAPITAL MURDER DOES NOT VIOLATE THE CONSTITUTIONAL PROSCRIPTION AGAINST DOUBLE JEOPARDY.

The fifth amendment to the United States Constitution provides that a state may not put a defendant in jeopardy twice for the same offense. *Benton v. Maryland*, 395 U.S. 784 (1969). Although the proscription against double jeopardy long was held to apply only to the guilt-innocence determination, this Court has expanded it to the punishment phase of capital trials. *Bullington v. Missouri*, 451 U.S. 430 (1981). Thus, a defendant who is assessed a life sentence which subsequently is reversed may not again be exposed to a potential sentence of death. *Id.* at 446.

Appellate reversal of a conviction or sentence implicates the Double Jeopardy Clause only when it is on the ground of insufficient evidence. *Bullington*, 451 U.S. at 442; *Burks v. United States*, 437 U.S. 1, 15-16 (1978). When the reversal is predicated on any other ground, the slate is "wiped clean," so that if the defendant is convicted again he may constitutionally be subjected to whatever punishment is lawful. *Poland v. Arizona*, 476 U.S. 147, 152 (1986), quoting *North Carolina v. Pearce*, 393 U.S. 711, 721 (1969).

Here, the court below found that no double jeopardy concerns are present because no finding on punishment was made in Sorola's favor, App. D at 10, and because "the trial judge in this cause was not authorized by law to assess [Sorola's] punishment" App. D at 11. Thus, this case is distinguishable from *Arizona v. Rumsey*, 467 U.S. 203 (1984), in which the trial court made

a finding favorable to the defendant, albeit on the basis of a misconstruction of state law.

Further, the trial court here did not simply misapply state law as did the court in *Rumsey*; instead, the court exceeded its authority by imposing a sentence which it was not authorized to assess. Because the trial court's assessment of punishment was void *ab initio*, the result reached by the court below is consistent with the rule that a retrial is not violative of double jeopardy when the court in which the first trial was held lacked subject matter jurisdiction. See, e.g., *United States v. Khan*, 822 F.2d 451 (4th Cir. 1987); *Moore v. Foti*, 546 F.2d 67 (5th Cir. 1977). Inasmuch as the disposition of this case turns on the Texas appellate court's resolution of this state law question, there is no substantial constitutional issue present in this case which might warrant exercise of this Court's certiorari jurisdiction.

CONCLUSION

For these reasons, the state respectfully prays that the petition for writ of certiorari be denied.

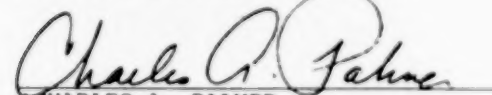
Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant
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ATTORNEYS FOR RESPONDENT

* Counsel of record



THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

September 29, 1989

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

The Honorable Joseph F. Spaniol, Jr.
Clerk, United States Supreme Court
Office of the Clerk
1 First Street, N.E.
Washington, D.C. 20543

Re: Joe Sorola v. The State of Texas, No. 88-7384

Dear Mr. Spaniol:

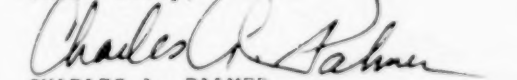
Enclosed for filing with the papers in the above styled cause are the original and nine typewritten copies of Respondent's Brief in Opposition. Also enclosed are the Proof of Service and Appearance of Counsel forms.

Please indicate the date of filing on the enclosed copy of this letter and return it to me in the enclosed postpaid addressed envelope.

By copy of this letter, one copy of said brief has been sent to counsel for Petitioner.

Thank you for your kind assistance in this matter.

Yours truly,


CHARLES A. PALMER
Assistant Attorney General
P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

CAP/sw
Enclosures
cc: Richard E. Langlois
Attorney at Law
2019 San Pedro
San Antonio, Texas 78212

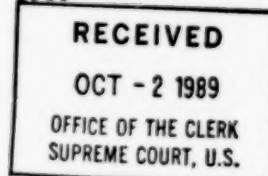
512-463-2100 SUPREME COURT BUILDING AUSTIN, TEXAS 78711-2548



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTON
ATTORNEY GENERAL**

September 29, 1989



The Honorable Joseph F. Spaniol, Jr.
Clerk, United States Supreme Court
Office of the Clerk
1 First Street, N.E.
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Yours truly,

Charles A. Palmer
CHARLES A. PALMER
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APPEARANCE OF COUNSEL

The Clerk will enter my appearance as counsel for the State of Texas which in this Court is Respondent. I certify that I am a member of the bar of the Supreme Court of the United States.

Charles A. Palmer
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P.O. Box 12548, Capitol Station
Austin, Texas 78711
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ATTORNEY FOR RESPONDENT

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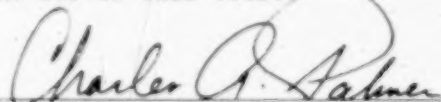
THE STATE OF TEXAS,

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On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

PROOF OF SERVICE

I hereby certify that on the 29th day of September, 1989, one copy of the Respondent's Brief in Opposition was mailed, postage prepaid, to Richard E. Langlois, 2019 San Pedro, San Antonio, Texas, 78212. All parties required to be served have been served. I am a member of the Bar of this Court.

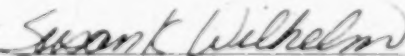


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ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO BEFORE ME this 29th day of September, 1989.



NOTARY PUBLIC in and for
Travis County, T E X A S